STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 21, 2011
v	No. 294091 Roscommon Circuit Court
KENNETH LEE CASE, Defendant-Appellant.	LC Nos. 08-005597-FC; 08-005645-FH

Before: MARKEY, P.J., and FITZGERALD and SHAPIRO, JJ.

PER CURIAM.

Following a consolidated jury trial, a jury convicted defendant in docket number 08-005645-FH of three counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b)(*iii*) (actor in position of authority) (LC No. 08-005597-FC), and acquitted him of three counts of first-degree criminal sexual conduct (CSC I). The jury convicted defendant in docket number 08-005597-FC of seven counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(e)(*i*) (actor is teacher, substitute teacher, or administrator). The trial court exceeded the sentencing guidelines in sentencing defendant to concurrent prison terms of 10 to 15 years on each count. We affirm.

I. FACTS

Defendant was a teacher and administrator at the victim's school. Outside of school, the victim played in a band with defendant and his wife. The victim would spend the night at defendant's residence after practicing with the band on Thursday nights. The victim also travelled with defendant and his family to various performances, as well as on vacations to Nova Scotia and Europe. The victim testified that she was age 15 when defendant began to touch her sexually and have her touch him. According to the victim, the sexual activity increased to include digital penetration and oral sex and, once she reached the age of 18, the two began to engage in sexual intercourse. Defendant admits to having a consensual affair with the victim after she turned 18, but denies any sexual activity while the victim was underage. He argues that she fabricated the allegations after it became clear that he would not leave his wife.

II. RIGHT TO PRESENT A DEFENSE AND RIGHT OF CONFRONTATION

Defendant argues that he was denied the right to present a defense and his right of confrontation by the trial court's evidentiary rulings and comments about the length of the trial. The federal Constitution protects an accused's right to present a defense as an element of due process. *Washington v Texas*, 388 US 14, 18-19; 87 S Ct 1920; 18 L Ed 2d 327 (1967).

Mindful that evidentiary error may deprive an accused of his constitutional rights, *People v Adamski*, 198 Mich App 133, 137-138; 497 NW2d 546 (1993), courts should not mechanistically apply evidentiary rules "where constitutional rights directly affecting the ascertainment of truth are implicated." *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Nevertheless, "an accused's right to present evidence in his defense is not absolute." *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008).

Defendant argues that the trial court infringed upon constitutionally protected interests by preventing him from introducing evidence suggesting that he was falsely accused. Specifically, defendant claims the trial court "disemboweled" his defense by preventing him from submitting the "purple book"[1] as evidence, restricting his expert's testimony, preventing inquiry into previous false allegations, confining defendant's attempts to show motive for the false accusations, and repeatedly commenting that defendant's questions to witnesses were wasting time.

The victim testified that she wrote the purple book for defendant and his wife as she was preparing to leave for college as a way to express her feelings about the time she had spent with them. When the prosecution raised a hearsay objection to a question about the contents of the book, the court stated, "I am not sure I am going to allow the entire book in," but did allow defendant to ask whether the book included any references to defendant touching the victim inappropriately. The victim testified that the purple book did not reference any sexual abuse. Defendant's trial counsel then moved on to question the victim about the existence of a journal referred to in the purple book. The victim indicated that she had no recollection of a journal.

Defendant contends that he intended to show that the contents of the purple book were completely at odds with the plausibility of the accusations leveled against him because the victim wrote in glowing terms of her time with defendant and his wife. Defendant argues that the trial court effectively ruled the purple book inadmissible by making clear that it would not allow the book to come in into evidence. However, defendant did not move to admit the book, nor did he inquire about the passages he now deems critical. Although the court commented that it was "not sure" it would allow the entire book into evidence when the prosecutor presented a hearsay objection, the court did not preclude defense counsel from asking questions about relevant

[1] The purple book was a book of remembrances written by the complainant for defendant and his wife when complainant left for college.

material found within the book. Further, defendant provides no authority in support of his argument that he effectively moved for admission of the book by marking it as an exhibit. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). We see no error in the court's handling of the matter.

Defendant also challenges the trial court's limitation of testimony by his expert witness, Katherine Okla, Ph.D. The trial court originally prohibited Okla from testifying that, as a routine matter, mental health practitioners normally ask a victim is he or she had suffered any abuse and that most victims will tell the truth. Ultimately, the trial court allowed testimony about the percentage of victims who report abuse when asked. Defendant argues that the court limited the testimony because it was concerned about the length of the trial. The record reveals, however, that the trial court clearly stated that it based its ruling on relevancy. The court stated that there was no evidence of record that anyone had directly asked complainant if she had been abused and, therefore, it was irrelevant whether most abuse victims would tell the truth. MRE 702. The court did mention "waste of time," but only within the context of citing MRE 403. And under MRE 403, the court is completely within its rights to exclude evidence that it feels will merely be a waste of time. The trial court did not abuse its discretion by limiting Okla's testimony. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant also sought to question the victim about prior accusations of sexual assault to show that she had made false accusations in the past. The court barred this line of questioning based on both the rape shield statute, MCL 750.520j, and the court's belief that the questions would lead to a trial-within-a-trial about incidents of limited probative value. The rape shield statute generally precludes admission of evidence regarding a victim's past sexual conduct.[2] Our Supreme Court has held, though, that a "defendant should be permitted to show that the complainant has made false accusations of rape in the past." *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984). However, the defendant is first obligated to make an offer of proof including concrete evidence that the victim made a prior false accusation. *Id*. at 350; *People v Williams*, 191 Mich App 269, 273; 477 NW2d 877 (1991). In this case, defendant did not offer any evidence that complainant had made previous false accusations. The trial court did not err by prohibiting defendant from inquiring about alleged prior false accusations.

Defendant next argues that the trial court prevented him from attempting to develop a motive for false allegations by showing that the victim's relationship with defendant's wife became strained and was marked by fights. After defendant's wife described one fight with the victim and began to describe another, the prosecutor raised a relevancy objection. Defense counsel argued that the evidence was relevant to the victim's motive to make false accusations. The court sustained the objection "because of undue delay, waste of time, needless presentation

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[2] Defendant does not address the rape shield statute on appeal, and thereby abandons any argument to the contrary. *Kelly*, 231 Mich App at 640-641.

of cumulative evidence." MRE 403.[3] The court did not strike the previous testimony by defendant's wife, nor did it prohibit defendant from inquiring if or how often she and the victim had fought. Indeed, the court stated, "I think you can ask if there was a fight." The court limited defendant from inquiring into the details of each individual fight.

Thus, the record shows that defendant was able to introduce evidence of personal friction between his wife and the victim. Further, it appears that the court would have allowed additional evidence on the subject (i.e., whether there had been a fight) as long as the details of the fight were not examined. The court simply balanced the probative danger of the evidence against its logical relevance, MRE 401, and concluded that the best balance to be struck would be to limit inquiry into the details of each fight. This decision is within the continuum of reasonable outcomes. *Babcock*, 469 Mich at 269.

Defendant next argues that the trial court improperly excluded evidence that defendant's mother was capable of climbing stairs, contrary to the victim's testimony. However, defendant's wife was, in fact, allowed to testify on this point.

Finally, defendant argues that his defense was "short-circuited" by the trial court's repeated expressions of impatience with the length of the trial and that these comments demonstrated a pattern of judicial bias. However, "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996) (internal quotation marks and citation omitted). Nor is there any indication that the court's remarks improperly influenced the jury. First, some of the comments were clearly made in the context of applying MRE 403. Second, some of the comments complained of were not made in front of the jury. Third, some of the comments were directed at the prosecutor and defense counsel alike, and the court's comment that it "couldn't stand another four or five days of this" was directed at the prosecutor alone. Fourth, the jury instructions included an admonishment that the court's "comments, rulings, questions, and instructions are not evidence," and "[i]f you believe I have an opinion about how you should decide this case, you must pay no attention to that opinion." A jury is presumed to follow the court's instructions, including those intended to cure any prejudicial effect of inappropriate statements. *Unger*, 278 Mich App at 235. Thus, defendant has not overcome the "heavy presumption of judicial impartiality." *Cain*, 451 Mich at 497.

In sum, there is no evidence of any misconduct or bias by the court, nor were any of its evidentiary rulings erroneous. Accordingly, defendant was not denied his constitutional rights to present a defense and to confront the witnesses against him.

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[3] By citing MRE 403, which addresses the exclusion of relevant evidence, the court implicitly acknowledged the relevancy of the evidence.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Whether a defendant received ineffective assistance of counsel is a mixed question of fact and law. *People v Riley* (*After Remand*), 468 Mich 135, 139; 659 NW2d 611 (2003). There is a strong presumption that defendant's counsel was effective. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Counsel's performance only falls below the objective standard of reasonableness if he "makes errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The second component requires the defendant to show "the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*.

The burden of proving the necessary facts is on the defendant. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). If the necessary facts are not in the record, the defendant may move for a new trial and create a separate record to support his claims. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Defendant argues that some of the necessary facts are not before this Court, and seeks remand to the trial court for an evidentiary hearing.[4]

Defendant argues that trial counsel was ineffective for failing to move to admit the purple book into evidence and for failing to seek review the victim's additional counseling records. Normally, choices about what evidence to present and which witnesses to call are presumed to be matters of trial strategy, and the decision not to seek *Stanaway*[5] review of the additional therapy records would fall under this heading. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). In this case, defendant's trial counsel has provided an affidavit to the effect that he intended to move for admission of the purple book and to seek to review the therapy records, and that if he failed to do so it was an oversight and not trial strategy.

Assuming, without deciding, that counsel should have moved for admission of the purple book, he fails to show that he suffered any prejudice as a result of this error. Defendant argues that the purpose for admitting the purple book was to show how enthusiastic complainant was about the time she spent with the Cases. Unlike a daily diary, the purple book was not composed contemporaneously with the alleged sexual assaults, but was written as a remembrance when the

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[4] During the motion for a new trial, defendant requested an evidentiary hearing, which the court denied.

[5] *People v Stanaway*, 446 Mich 643, 677; 521 NW2d 557 (1994).

victim was preparing to go to college. Several entries are allegedly recreations of what the victim had written in her personal journal, but they all deal with a time period before she turned 15. While the book depicts a fondness for the Cases and a sense of closeness to them, the victim admitted at trial that she was very close to the Cases at trial. Therefore, defendant fails to show the requisite prejudice.

Defendant also argues that trial counsel erred in not properly following through on his request to seek review of the victim's counseling and therapy records. In support, defendant cites trial counsel's averment that he did not remember if he had followed up on the records, and if he did not, it was an omission on his part. Trial counsel's equivocal statement does not support the assertion that counsel failed to follow up on additional records. Nor is there any indication that there actually was an additional therapist, and if so the identity of that therapist.

The record also does not support defendant's assertions about the material provided pursuant to an order of the court following an in camera review of submitted records. Trial counsel avers that he provided to appellate counsel "the pages I believe I received from the court pursuant to the January 8, 2009 order." This issue boils down to whether trial counsel was provided copies of three emails not included in the records given to appellate counsel. Again, trial counsel's equivocal statement is insufficient to establish that an error was made.

Further, defendant fails to show how he was prejudiced by trial counsel's handling of the records. These emails were admitted below without objection by defense counsel, and were used during direct examination of complainant, again without objection. Arguably, three of the emails evidence the existence of a sexual relationship. They paint a picture of a man struggling with his sexual desire for the victim and who is having difficulty letting go of the relationship. A decision by trial counsel not to focus on these emails would have been a reasonable strategy.

IV. *STANAWAY* MATERIALS

A defendant is entitled to in camera inspection of privileged material on a showing that the defendant has a good-faith belief, based on concrete evidence, that there is a reasonable probability that the records contain material information necessary to the defense. *Stanaway*, 446 Mich at 677. "Only after the court has conducted the in camera inspection and is satisfied that the records reveal evidence necessary to the defense is the evidence to be supplied to defense counsel." *Id*. at 679. Defendant concedes that the trial court reviewed the *Stanaway* materials requested in the motion to compel discovery. He argues, however, that the court improperly reviewed the records and that further review is necessary to determine whether the trial court missed anything. Defendant suggests that the trial judge did not do a thorough review because the judge could not recall if the counselor ever asked the victim if she had been abused. Defendant's concern that the court might have missed something important in the records is premised on a statement by the court that it did not know if complainant's therapist had asked

her if she had been abused.[6] However, we have not find any evidence in the record of this direct question. Defendant omits from his argument the context in which the court made the statement. The court, counsel, and Okla engaged in a lengthy discussion regarding whether Okla would be allowed to state her expert opinion on the phenomenon of delayed disclosure. Okla was going to provide testimony regarding rates of disclosure when a victim is asked about abuse. But when asked how that testimony would apply to the case at hand, Okla replied that it was her understanding that complainant had been seen by "people in the hospital, for example, with therapist or counselors," who would have likely asked her about sexual abuse. It was to this that the court responded, "Whether it should have been asked or whether it was, we can't—as far as I know, that was never asked. . . . The counselor has not testified, was not called as a witness in this case." Therefore, when the remark is placed in context, it is clear that the court was not stating a personal belief based upon personal knowledge (or lack thereof), but was simply stating that the proffered opinion testimony was not tied to any facts in evidence. MRE 702 ("[T]he witness has applied the principles and methods to the facts of the case."). Moreover, the trial court stated that it reviewed the records, and provided defendant with all of the evidence necessary to his defense. See *id*. at 679 ("We are confident that trial judges will be able to recognize such evidence.").

This Court has completed a review of the voluminous counseling records of the victim in this case in light of defendant's argument that the court "improperly reviewed the records and that further review is necessary to determine whether the trial court missed anything." The records reveal that the trial judge clearly reviewed the records as he segregated the pages he thought were relevant and tabbed their locations in the large box of records. Further, our review has revealed nothing that would be exculpatory in any of these materials. To the contrary, the records and e-mails between the victim and her counselor are replete with descriptions of the sexual abuse and the torment it caused the victim.

Defendant also requests that he be allowed to review the files himself. This is clearly not permitted, as it would defeat the entire purpose of the precautions embodied in the *Stanaway* procedure. *Stanaway*, 446 Mich at 679 ("The presence of defense counsel at such an inspection is not essential to protect the defendant's constitutional rights and would undermine the privilege unnecessarily").

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro

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[6] Appellate counsel also suggests that he may have received a different number of pages from the court than trial counsel had received. As noted above, trial counsel's statement about the documents he received is not a direct assertion that he did not receive the three emails in issue. Also as noted above, all of the disputed records were admitted at trial as joint exhibits.